

*United States Court of Appeals
for the Second Circuit*



**INTERVENOR'S
BRIEF**

No. 75-4046

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH)
COMPANY,)
Petitioner,)
v.)
FEDERAL COMMUNICATIONS COMMISSION) No. 75-4046
and UNITED STATES OF AMERICA,)
Respondents,)
COMMONWEALTH OF PENNSYLVANIA, et al.,)
Intervenors.)

On Petition for Review
of an Order of the
Federal Communications Commission

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA



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Commonwealth of Pennsylvania, by its Attorney General,
submits this answering brief in response to the initial briefs
of petitioner, American Telephone & Telegraph Company (AT&T),
and those intervenors in support of AT&T's position, namely,
United States Independent Telephone Association (USITA), and
General Telephone Company of California, et al.

Pennsylvania supports the action of the Federal Communications Commission (F.C.C.), which in its March 4, 1975 order rejected certain increased interstate rates proposed by AT&T

1/

for its telecommunications services. On the other hand, Pennsylvania opposed the level of charges allowed by the F.C.C. in the same March 4 order. Since AT&T only seeks to review part of the March 4 order, i.e., that part rejecting the \$717 million increase, but does not seek to set aside the \$365 million obtained by the same March 4 order, Pennsylvania is in general support of the F.C.C. in this Court.

The Agency Decision

AT&T on January 3, 1975, filed tariffs with the F.C.C., to become effective March 4, designed to increase interstate rates by an aggregate of \$717 million, predicated upon an asserted need to achieve a rate of return between 10½-11%.

The F.C.C. on March 4 rejected AT&T's tariffs, as violative of outstanding orders setting a maximum 8.5% rate of return in 1972. AT&T, 38 F.C.C. 2d 213 (1972). However, the same March 4 order allowed AT&T to file tariffs designed to achieve a 8.74% rate of return, increasing revenues by \$365 million.

The 1975 increase is the third general long-distance telephone rate increase since 1971. AT&T, 27 F.C.C. 2d 151 (1971); AT&T, 38 F.C.C. 2d 213 (1972), reconsid. den. 42 F.C.C. 293 (1973). The 1972 decision prescribing the 8.5% rate of return is undergoing review in the U.S. Court of Appeals in Washington, D.C. (Nos. 73-1045 & 73-2051). Commonwealth of Pennsylvania is an active intervenor in those proceedings.

1/ MTS, WATS, and private line.

Position of Pennsylvania

Pennsylvania is substantially affected by increased interstate telephone rates. In addition to the impact upon interstate service, actions of the F.C.C. have a direct affect upon Pennsylvania intrastate rates. By virtue of the parity maintained by intrastate long-distance charges with the interstate charges, the rates for services solely within Pennsylvania are increased, effective simultaneously with the interstate charges. This parity has received judicial sanction by Pennsylvania courts and by the U.S. Supreme Court. See: Bell Telephone of Penna. v. Public Utility Comm'n, 5 A. 2d 410, aff'd 309 U.S. 30 (1940), and Commissioner Johnson's separate expression in AT&T, 38 F.C.C. 2d 213, 273 (1972).

Pennsylvania is in general support of the F.C.C. in this court. While Pennsylvania disagrees with the F.C.C. on the magnitude of the increase granted AT&T in its March 4 order, we support the procedural mechanism taken by the agency in rejecting AT&T's proposed higher rates.

ARGUMENT

THE F.C.C. FOLLOWED PROPER PROCEDURES
AND RELIEF FOR AT&T WOULD BE INEQUITABLE.

Pennsylvania is in general accord with F.C.C.'s brief to the Court. As explained therein, the procedure employed by the F.C.C. in 1971, when AT&T sought a substantial rate increase for long-distance service, was for the agency to request AT&T for an indefinite postponement, and at the same time allow AT&T to seek special permission to publish charges resulting in a lesser amount deemed appropriate by the F.C.C. on an interim basis, pending completion of hearings. This technique allowed

AT&T an immediate increase without the statutory three-month suspension. An agency such as the F.C.C. has broad power at that stage of the proceeding. See: United States v. SCRAP, 412 U.S. 609 (1973); Port of New York Authority v. United States, 451 F. 2d 783, 785-86, 787, n. 17 (2d Cir. 1971).

This procedure was inappropriate in 1975, because the F.C.C. after extensive hearings and arguments during the two-year period 1971-73, had prescribed a maximum 8.5% rate of return. Accordingly, the F.C.C. this time rejected the new tariffs, but permitted the filing of tariffs seeking a lesser amount, upon a finding that some upward revision of the rate of return was justified. However, an investigation was instituted concerning the rate of return.

AT&T's arguments to this court are that the F.C.C. should not have rejected the 1975 filing. Its basic contention is that the F.C.C. is without power to reject a tariff, admittedly in violation of an outstanding F.C.C. order, unless the F.C.C., in addition, also previously prescribed the actual individual rates which flowed from the order now being violated.

The short answer to AT&T is that Congress never intended to place the F.C.C. in such a procedural bind. The result would be to award AT&T windfall profits in the instant situation. AT&T would receive its full rate increase at the end of the 3-month statutory period, but would have been unjustly enriched by the \$365 million increase during the interim period.

1. The F.C.C. Can Prescribe a Rate of Return. This court has held that the form of a rate prescription is not controlling, but that the actual impact is determinative. American Telephone and Telegraph Company v. F.C.C., 449 F. 2d 439, 451 and n. 12

(2d Cir. 1971), quoted with approval in the so-called "Special Permission" case. American Telephone and Telegraph Company v. F.C.C., 487 F. 2d 864, 874 (2d Cir. 1973). Here, the F.C.C. in 1971-73 proceeded along the traditional two-step manner, whereby it first determined that AT&T's overall rate proposal would be excessive and prescribed a 8.5% maximum, and then left for later consideration the matter of specific rates to conform with such prescription of rate of return. This is standard procedure for regulatory agencies. F.P.C. v. Tennessee Gas Co., 371 U.S. 145 (1962); Power Comm'n v. Pipeline Co., 315 U.S. 575, 583-85 (1942).

Once the F.C.C., after full hearing, found AT&T's future revenue need requirements, the agency could reject tariff filings inconsistent therewith. Otherwise, the utility could continuously disregard orders only several months later. See: Permian Basin Area Rate Cases, 390 U.S. 747, 779 (1968).

The F.C.C. acted properly in rejecting the AT&T tariffs as inconsistent with outstanding orders regarding rate of return.

2. AT&T is Barred by Equitable Estoppel. The F.C.C. on March 4 did not suspend the \$717 million increase for the full statutory period. Likewise, the F.C.C. did not insist upon an indefinite postponement of the \$717 million increase conditioned upon allowing a lesser sum to become effective, together with expedited hearings. Rather, the F.C.C. this time rejected the \$717 million increase, while allowing a lesser sum to become effective, together with expedited hearings.

AT&T immediately placed the \$365 million increase into effect shortly after issuance of the March 4 order, and then sought court review of that part of the March 4 order which rejected the tariff.

The Supreme Court has ruled that equitable principles apply in suits to set aside or to enjoin an order of an administrative agency. See: United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952); Myers v. Bethlehem Steel Corp., 303 U.S. 41, 51 (1938); Rochester Telephone Corp. v. United States, 307 U.S. 125, 136 (1939).

In Admiral-Merchants Motor Freight, Inc. v. United States, 321 F. Supp. 353, 359-60 (D. Colo. 1971), aff'd 404 U.S. 802 (1972), certain carriers were granted an extension of time to present their case in support of new rates on condition that they make refunds to the extent the rates were ultimately found to be unreasonable. When they later attacked the refund order, the court refused them relief, finding that "their present posture appears to us to be grossly inequitable and not deserving of court intervention."

Here, AT&T accepted the immediate rate increase of \$365 million, while attacking that part of the order rejecting the \$717 million increase. However, the rejection of the tariff and the \$365 million increase are clearly interrelated, for if the tariffs were lawfully filed, the F.C.C. undoubtedly would have attached other conditions to the \$365 million increase, or would have denied AT&T any increase for the statutory suspension period. Cf. FPC v. Colorado Interstate, 348 U.S. 492, 501-2.

The court should not lend its hand to potential windfall profits for AT&T. AT&T is not entitled to attack that part of the March 4 order denying \$717 million, while it received an immediate \$365 million increase by the same order. AT&T accepted the immediate \$365 million, rather than decline this sum and petition this Court for immediate hearing on the agency

record by extraordinary procedures.

CONCLUSION

That portion of the Memorandum Opinion and Order of the Federal Communications Commission, adopted March 4, 1975, which rejects AT&T's tariff revisions, should be affirmed.

Respectfully submitted,

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May 21, 1975

UNITED STATES COURT OF APPEALS
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v.)) No. 75-4046
FEDERAL COMMUNICATIONS COMMISSION)

Certificate of Service

I hereby certify that 2 copies of BRIEF OF COMMONWEALTH
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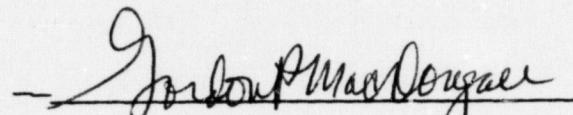
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